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ALEXANDER L. STEVAS,  
CLERK

No. 84-5

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1984.

EDNA GOLDSTEIN,  
PETITIONER,

v.

ROBERT E. KELLEHER, ROCKDALE MEDICAL  
CORPORATION AND UNITED STATES OF AMERICA,  
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

**Opposition for Respondents, Robert E. Kelleher and  
Rockdale Medical Corporation to Petition for  
Writ of Certiorari to the United States Court  
of Appeals for the First Circuit.**

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### **Question Presented**

Whether jury trial and entry of judgment by a federal magistrate with the voluntary consent of all parties pursuant to the Federal Magistrates Act, 28 U.S.C. 636(c), comports with the requirements of Article III of the Constitution.



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**Summary of Argument.**

There is no legal conflict for this Court to address because the portion of the Federal Magistrates Act that allows Magistrates to try civil cases and enter judgments when all parties voluntarily consent to such a trial has been held constitutional by all Circuit Courts that have addressed the issue and does not conflict with any precedent of this Court. In addition, no person's constitutional rights are compromised by the Act so there is no reason for the Court to grant the petition for a writ of certiorari.

## Argument.

### I. THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT CERTIORARI IN THIS CASE.

#### A. *The Decision Below Does Not Conflict with the Decision of Any Court.*

Each Circuit Court that has addressed the constitutionality of the consensual trial of a civil action by a magistrate under 28 U.S.C. 636(c) has upheld the statute. *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir.), *petition for cert. filed*, (U.S. June 27, 1984) (No. 84-5); *Collins v. Foreman*, 729 F.2d 108 (2d Cir. 1984) *petition for cert. filed*, (U.S. July 2, 1984) (No. 83-1616). *Wharton-Thomas v. United States*, 721 F.2d 922 (3rd Cir. 1983); *Puryear v. Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Lehman Brothers Kuhn Loeb, Inc. v. Clark Oil & Refining Corp.*, No. 83-1874 (8th Cir. decided July 11, 1984) (en banc); and *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc) *petition for cert. filed*, (U.S. May 16, 1984) (No. 83-1873).

While acknowledging that no conflict exists among the circuits, Petitioner urges that the decision below is inconsistent with *United States v. Raddatz*, 447 U.S. 667 (1980). This position is untenable because the Court in *Raddatz* upheld the constitutionality of Section 636(b)(1)(B) of the Magistrates Act, 28 U.S.C. 636(b)(1)(B), and did not address the section under consideration in the present case. The issue before the court in *Raddatz* was whether a district judge could constitutionally make a de novo determination regarding a suppression motion based on the transcript of a hearing held before a magistrate without the benefit of a de novo hearing. The Court specifically stated: "We need not decide whether, as suggested by the Government, Congress could constitutionally have delegated the task of rendering a final decision on a suppression

motion to a non-Art. III officer." *Raddatz*, 447 U.S. at 681. The present issue, whether a consensual civil trial conducted by a magistrate violates Article III of the Constitution, was never raised or decided. Thus, there is no conflict between *Raddatz* and the decision below, each of which upheld the constitutionality of different portions of the Magistrates Act.

Petitioner also argues that certiorari should be granted because she believes the decision below conflicts with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the case which struck down the Bankruptcy Reform Act of 1978. This alleged conflict is also non-existent because *Northern Pipeline* addressed the issue of whether a mandatory, nonconsensual trial by a non-Art. III judge violated the Constitution, not the issue of whether consensual reference of a civil action to a magistrate for trial is constitutional. See *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 542-43 (9th Cir. 1984) *petition for cert. filed*, (U.S. May 16, 1984) (No. 83-1873) for an excellent discussion of the role lack of consent played in *Northern Pipeline*. Where the question of consensual reference to a magistrate was not presented to the Court, there could be no holding on that issue and no legal conflict with a subsequent case, such as the present one that has decided that a consensual reference is constitutional. Thus, a writ of certiorari need not be granted to harmonize conflicting case law.

In a minor and tangential argument, Petitioner urges that the decision below conflicts with *Glover v. Alabama Board of Corrections*, 660 F.2d 120 (5th Cir. 1981), a decision denying a petition for rehearing after the Court had dismissed the plaintiff's appeal for lack of jurisdiction. The issue before the Fifth Circuit was whether the decision by the magistrate in favor of certain correction officials had been rendered under 28 U.S.C. 636(b) or 28 U.S.C. 636(c). The distinction was cru-



cial to the issue of jurisdiction because § 636(c) allows a direct appeal to the Court of Appeals while § 636(b) requires that the district court make a magistrate's order final before an appeal can be taken. The district judge in that case had not issued a final order. The Fifth Circuit held that, under the circumstances of that case, the consent had been given under § 636(b), not § 636(c) and that therefore it had no jurisdiction because there was no final order. Thus, the decision below that the consensual reference of a civil trial to a magistrate is constitutional does not conflict with the holding of the *Glover* case.

Another reason why this Court need not consider Petitioner's argument that the manner of consent was inappropriate is that Petitioner never raised the issue of consent below. The First Circuit noted that the "jury trial was conducted in the District of Massachusetts before a United States magistrate, with the express consent of the parties, as provided for in section 636(c)(3) of the Federal Magistrates Act". *Goldstein v. Kelleher*, 728 F.2d 32, 34 (1984). Even in her petition for a writ of certiorari, Petitioner admits that she agreed to the reference. (Petition for a writ of Certiorari, p. 5). Her argument is, in essence, that even though she gave her voluntary consent to have the magistrate try the case, she now wishes to raise for the first time a technical, factual issue, without a substantiating record, for the Supreme Court of the United States to decide. This Court is not an appropriate forum to determine whether the Petitioner adequately consented to have a magistrate preside at her trial, especially where Petitioner has never raised the issue before. The Supreme Court does not "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

B. *This Court Need Not Consider This Case Because It Does Not Raise An Important Question of Law.*

Petitioner urges that 28 U.S.C. 636(c) is unconstitutional because it "alters the Constitution and the framework of the government." (Petition for a Writ of Certiorari, p. 17). However, the Federal Magistrates Act is valid under the Constitution because it does not offend the separation of powers among the three branches of government nor does it compromise any individual's rights.

The Federal Magistrates Act has retained the essential attributes of judicial power in Art. III tribunals. As discussed in *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc) *petition for cert. filed*, (U.S. May 16, 1984) (No. 83-1873), the "standard for determining whether there is an improper interference with or delegation of the independent power of a branch is whether the alteration prevents or substantially impairs performance by the branch of its essential role in the constitutional system. *Nixon v. Administrator of General Services*, 433 U.S. 425, 433 . . . (1977)". Under that standard, it is clear that consensual trials by magistrates maintain "both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law." *Pacemaker*, 725 F.2d at 544 (citations omitted). Magistrates must be "specially designated to exercise such jurisdiction by the district court." 28 U.S.C. 636(c)(1). The methods of appointment and removal of magistrates are entrusted to the district court. 28 U.S.C. 631(a) and (i). Finally, the district court retains the power to withdraw the reference. 28 U.S.C. 636(c)(6). Through these restrictions, and the fact that parties have the right to appeal to an Art. III court, the Article III courts control the magistrate system and assure that the magistrates are not directly dependent on either of the political branches of Government. Thus,

the Federal Magistrates Act does not violate the separation of powers embodied in the Constitution.

Petitioner also complains that magistrates who try cases by consent of the parties and under the supervision of Art. III judges do not have life tenure or salary protection. While it is of course true that magistrates have neither life tenure nor salary protection, those requirements were adopted for the protection of the parties and, consequently, they may be waived. As noted by the Court in *Pacemaker*, even fundamental rights, including the right to a jury trial or to the trial itself, may be waived. *Pacemaker*, 725 F.2d at 543. Petitioner, having voluntarily consented to a jury trial before a magistrate, has not now raised an issue necessary for the Supreme Court to decide.

### Conclusion.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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